

Q: What is your name and business address?

A: David G. Bortz, Department of Natural Resources (DNR), South Puget Sound Region,
PO Box 68, Enumclaw, WA 98022-0068.

Q: Where are you employed and what is your job title?

A: I am employed in the South Puget Sound Region of DNR, and my job title is Project
Section Manager.

Q: What is your educational background?

A: B. A. History, University of Maryland

J. D. Law, Catholic University

L. L. M. Law and Marine Affairs, University of Washington

Q: Will you summarize your professional experience?

A: I worked for the Federal Power Commission as a trial attorney, reviewing public utility
energy siting and utility rate making proposals of regulated Natural Gas Utility
Companies under the Federal Natural Gas Act. I then enrolled in the University of
Washington L. L. M. program and received the L. L. M. degree in Land and Marine
Policy. After graduate law school I worked as an Assistant Attorney General in the
Commonwealth of Northern Mariana Islands (CNMI) where I wrote the procedural
regulations for the CNMI's shore line management and safe drinking water programs and
served as counsel to the natural resources, environmental and planning agencies. I also
represented the CNMI as governmental affairs representative to the staff of the U. S.

State, Commerce and Interior Departments and the staff of the House Interior subcommittee on fishery and extended economic zone matters. After that I was in private practice of law in Seattle, before accepting a position with the Department of Social and Health Services as Deputy Contracting Officer and then a position with DNR as an assistant division manager where I was responsible for the staff work before the Board of Natural Resources to promulgate the portions of Chapter 332-30 WAC that implemented the 1984 Aquatic Lands Law (RCW 79.90.450 - RCW 79.90.902). Later, I was on loan to Puget Sound Water Quality to prepare procedural regulations and assist with agency contracting. I returned to DNR as a Project Section Manager in the Seattle office for the Aquatic Resources Program and have moved between Seattle and Olympia offices managing the real property and associated natural resources of the Aquatic Resources Program. To date, I have been responsible for leasing and easement negotiations on major projects in the Puget Trough, developing policy, business positions and legal documents used to manage the state-owned aquatic resources and managing staff responsible for administering the Aquatic Resources Program for King, Skagit, Pierce, Whatcom, Island and Snohomish Counties. I currently am the responsible staff person for the management of major real estate and development projects in the South Puget Sound Region that consists of King, Pierce, Kitsap and Mason Counties.

Q: What is the subject matter of your testimony?

A: My testimony is to describe the application of the legal requirements on, and process for an applicant to obtain a use authorization from the DNR to use state-owned aquatic land (SOAL) for a pipe line right of way to cross SOAL.

Q: Will you define “state-owned aquatic lands” as you will use the term in your testimony and describe the resources associated with those lands?

A: “State-owned Aquatic Lands” are all state-owned tidelands, shorelands, harbor areas and the beds of navigable water, and avulsed abandoned beds and channels of navigable bodies of water, managed by DNR or managed by public port districts under Port Management Agreements pursuant to RCW 79.90.475. The resources associated with those lands are living and non living resources. Living resources consist of those flora and fauna that live on or in the beds of aquatic land or in the water column in association with the aquatic lands, or those living resources living in association with other living resources that live in the aquatic lands. Non living resources include mineral resources like rock, sand, gravel and shellfish shell, that make up part of the beds of aquatic lands and any mineral resources found beneath the surface of those beds. Another non living resource is the water column itself covering those aquatic lands, which provide a medium for fishing, transportation, commerce and navigation uses benefitting the people of the state of Washington.

Q: Under what statutes and rules does DNR manage SOAL?

A: As more fully described in Mr. Bower’s testimony, DNR’s management authority over SOAL lies primarily in Chapters 79.90 through 79.96 RCW and in Chapter 332-30 WAC. DNR’s management is also governed by the General Public Land Chapters of Title 79 RCW, and affected by federal and state statutes and local ordinances that regulate the actions and development proposals of those parties who wish to develop SOAL.

Significant statutes that effect DNR's decisions concerning the real property it manages and that govern the actions of the users/applicants who are the grantees of property rights from DNR, include the State Environmental Policy Act (SEPA), the Shoreline Management Act, the Clean Water Act, etc. DNR in its management of SOAL must also conform to the common law and its duties under the Public Trust Doctrine.

Q: What is the nature of DNR's management authority regarding SOAL?

A: DNR acts as a real property and natural resources trustee and decision maker in its management of the SOAL for the benefit of the public, who are the owners of this real property and natural resources land base. RCW 79.90.450, .455, and .460. DNR is vested with the power to lease or otherwise grant property rights and interests to use SOAL subject to any terms and conditions required by the state Constitution, Chapters 79.90 through 79.96 RCW and Chapter 332-30 WAC.

Q: What is a "use authorization"?

A: A "use authorization" is the grant of a real property right to use SOAL to a public or private entity. These rights are normally granted in a legal instrument or document in deed form and recordable in the county where the property is located. DNR in granting the use authorization handles the entirety of contracting and real property details of the land transaction as a private land owner would, but as mandated by statutes (as detailed more fully below in my testimony and also in Mr. Bower's and Dr. Mumford's testimony) must also consider the natural resources (living and non-living) and ecosystem values associated with that land.

Q: How does the land manager implement DNR's real property and natural resources management authority when it receives an application for a use authorization from a private or public entity to occupy and utilize SOAL for a particular proposal?

A: The land manager reviews the application for a grant of a property right (easement, lease or right of entry) from the state of Washington to a private or public entity. DNR in its management and decision making for SOAL is not acting under specific regulatory authorities as described by a state or federal statute. DNR, is instead acting on behalf of the land owner, the state of Washington as the designated manager of SOAL by statutes mentioned above, and follows the specific direction of those statutes, or the rules it has promulgated pursuant to those statutes. The DNR staff person as land manager must also conform to the common law governing real property transactions, and must further consider the applicable elements of the Public Trust Doctrine in management of SOAL and the proposal's impacts on the associated ecosystems which may include adjacent aquatic lands or wetlands. In short the land manger is responsible for taking note of every authority affecting the grant of property rights and act appropriately in discharging his or her duty as a member of the staff of DNR, acting as the agent of the state of Washington in managing SOAL.

Q: So in summary, would it be correct to say that your job is to act as the owner's trustee and manager under DNR's real estate and natural resources management authority over SOAL?

A: Yes.

Q: What guidance do you utilize as land manager in implementing DNR's authority in reviewing the subject matter of an application for a property right to use SOAL?

A: Generally, my initial review is to evaluate the type of application and look to the relevant legal and policy guidance in DNR's governing statutes and rules mentioned above. In that review, I must become generally familiar with the applicant's proposal, its business form, the type of regulatory permits required, and any issues raised in the SEPA compliance performed by those permitting agencies. If any issues concerning business or environmental risks identified in that review cannot be resolved because the information is not in a complete enough form to apply that guidance, or because judgments that need to be made under that guidance are beyond my expertise, such as involving engineering, biology, environmental, or business risk, etc. I then can do several things which may include:

1. Requesting information from any of the following: the applicant, the permitting entities, anyone commenting on the permits or SEPA compliance, including entities like Indian tribes, neighbors or other land owners near the proposal's site.
2. Requesting assistance in the analysis of technical, environmental or business issues from DNR's Aquatic Resources Division experts and DNR'S risk manager.
3. Gathering any information, or technical analysis provided and briefing DNR management for further assistance in developing specific guidance for the application review and the development of the legal instrument that

grants the property right to the applicant.

Q: You mentioned in your above answer what you do generally when an applicant applies for a property right to use SOAL. Can you be more specific about the statutes and rules that may bear on an application, for example a pipe line that crosses SOAL?

A: Certainly. A pipe line is a use that is a nonwater-dependent use under my reading of the definition listed in RCW 79.90.465. Because of that, RCW 79.90.460 becomes important. That section indicates that nonwater-dependent uses are low priority uses of SOAL and provide only nominal public benefit and should not be newly established on SOAL except in exceptional circumstances. That section also directs that DNR must consider natural values of SOAL including the proposal's impact on wildlife, habitats, representative ecosystems and fishery spawning areas before issuing a use authorization. The section makes it clear that DNR may withhold from use any SOAL it finds that possess significant natural values or provide protection for those natural values. DNR's rules that bear on an application to use SOAL for a pipe line are more detailed. The general requirements, application review procedures, general rules involving fees, charges and rent, rules for utility pipelines and placement of improvements and structures on SOAL, and rules involving insurance and other security are found in WAC 332-30-122. WAC 332-30-137 states the policy for nonwater-dependent uses that must be applied to pipe lines crossing SOAL, including specifically placing the duty to meet all the standards of Chapter 332-30 WAC on the applicant. WAC 332-30-134(2) indicates that DNR may rely on permitting agencies to evaluate environmental impacts of projects, but because of specific statutory direction mentioned DNR does an independent

environmental risk determination as well. WAC 332-30-151 indicates that any area that is in reserve status for educational, scientific or environmental reasons cannot be authorized for use if the use conflicts with the reserve, nor can a use adjacent to a reserve be authorized if water quality or marine life could be degraded or damaged. Finally, WAC 332-30-163 provides criteria for SOAL river management that must be reviewed prior to any authorization.

Q: Without diminishing the importance of any DNR rule you listed which of the rules you listed would you highlight as the rules that are critical guidance for a pipeline proposal?

A: All of the rules are fact dependent but of the rules mentioned, I would highlight WAC 332-30-122. First, WAC 332-30-122(1)(c) which indicates all federal, state, and local permits must be acquired by the applicant proposing to use SOAL and copies of all permits must be provided to DNR prior to granting the property right to the applicant. Second, WAC 332-30-122 under Subsections(a) Environment sub parts (i), (ii) and especially (iii) provide:

1. That the instrument granting the property right must insure that the structures and activities on the SOAL are designed, constructed and maintained according to sound environmental practices.
2. That uses with adverse environmental impacts may only be authorized after compliance with all environmental laws and that appropriate steps as may be directed are taken to mitigate substantial or irreversible changes to the environment. DNR reads Section 122(a)(ii) to put the burden on the applicant for a property right on SOAL to meet

environmental laws and to design and prove the appropriateness of any mitigation proposed.

3. Nonwater-dependent uses that have significant adverse environmental impacts shall not be authorized Section 122(iii). DNR reads this section together with Section 122(2)(d) mentioned in Mr. Bower's testimony and Section 137(3) mentioned earlier in my testimony to create an extremely rigorous test for pipe line applicants to prove no significant adverse impacts or that no practical upland alternatives exist to the proposal.

Q: You described in detail the basic substantive requirements an applicant must meet to obtain a property right from DNR to use SOAL. What is the process that is followed in reviewing an application?

A: An applicant must complete a DNR application and submit it for review by DNR. The land manager, as part of her or his review of the substantive requirements, may utilize internal DNR check lists like the Environmental Review Process or the Leasing in Contaminated Sites process to help determine if issues spotted need to be referred to DNR sediment management or habitat protection experts to further refine environmental issues. Other resources for the land manager to consult for guidance include the Use Authorization Desk Manual, the Aquatic Resources Reference Manual and the DNR Aquatic Document Manual that contains various form instruments and interpretations of language of those instruments that DNR uses to complete real property transactions involving SOAL, including leases and easements.

Other major elements that the land manager must consider for new siting proposals on SOAL are the review of the SEPA compliance and the issues developed during the federal, state, and local environmental permitting process. These elements are important for two reasons. First, DNR rules, as mentioned above, do not permit granting a use authorization until all regulatory permits are obtained by DNR's applicant. Second the permitting process is a further source of information critical to DNR decision making on businesses, environmental or policy issues.

Any business, policy or environmental issues that cannot be completely resolved from consultation with environmental staff or in consultation with the land manager's supervisor are referred to mid-level management through oral or written briefings for further direction. Most DNR land managers managing SOAL are located in one of the seven region offices of the DNR near the resources they manage. If the mid-level region management is unable to assist the land manager in giving direction, the issue is then referred to DNR's Aquatic Resources Division at headquarters in Olympia. This referral is more extensive than the initial contact by the land manager with headquarters environmental technicians and process involves further land manager briefing of headquarters management staff on the issues. Thereafter, the land manager is involved in the consultation among technical, policy and management decision makers. Once all policy, business and environmental issues are resolved through the consultative process and guidance is received, the land manager drafts the appropriate proposed legal instrument, as found in the document manual. A record of decision packet is also prepared to accompany the proposed document, and they are then routed internally and reviewed by the appropriate mid-level manager. If those products are then deemed to be

consistent with DNR policies and governing law, they are then approved and the instrument is sent to the applicant for its decision to execute and return to DNR as an offer to the Commissioner or her delegate for DNR's final decision to execute the instrument. At this point, the DNR approving official may raise questions or issues that need resolution, including document revisions or follow up information gathering, prior to DNR's grant of a property right to the applicant for use of SOAL.

Q: In a DNR use authorization application submitted by the Olympic Pipeline Company, (OLP) on August 10, 1998, in file Application No. 51-070701, OLP proposes a pipe line corridor that crosses several navigable rivers. What is the effect of OPL's proposal on DNR's management of SOAL?

A: As indicated above, in general any use of SOAL requires DNR to issue a property right for that use. Navigable rivers that are navigable for title are owned by the state of Washington and are SOAL. Navigable for title rivers are those rivers that at statehood were capable or susceptible of being used in their natural state for the transport of useful commerce. Any one desiring to place improvements on the beds or shorelands of navigable rivers, as for all other SOAL must apply for authorization for a property right. In this case, OPL has applied to DNR for a use authorization to place its proposed oil products pipe line where it crosses SOAL. From the application information submitted to date by OPL to DNR it appears that the pipeline crosses SOAL at a minimum of five identified jurisdictional crossings of SOAL (as more fully discussed in Mr. Bower's testimony) and the route may cross lands in at least two locations that may be state-owned avulsed and abandoned beds and channels of navigable rivers. These crossings

have been consolidated and can be reviewed under one DNR application number.

However, until the permitting process is complete it is not clear whether any of these sites will be the actual river crossings.

Q: What issues does the OPL proposal raise in the context of risks to SOAL, and the management and protection of SOAL?

A: OPL's proposal raises two environmental risk issues, site specific and comparative environmental risk issues. The proposal also raises significant business risk issues. The site specific environmental risk issues will include a review of the impacts of the construction of the pipe line on sensitive living resources including wildlife, habitat, representative ecosystems and fishery spawning areas, associated with the crossing sites. In addition, understanding the likelihood of pipe line ruptures, leaks and spills during the pipe line's operation and maintenance and the potential impacts to those same living resources mentioned above will require a critical and independent real property and natural resource management decision. This decision is made independently even assuming all permits are granted, and SEPA and Endangered Species Act compliance is satisfied. The environmental issue is further complicated by the fact that two systems currently exist to transport petroleum products, one via OPL's Whatcom County to Portland, Oregon pipe line, and the Colombia River barging system to eastern Washington and another by tanker trucks over the Cascade Mountains to eastern Washington. OPL, in its EFSEC application, insists that all the risks posed by its current proposal will be comparatively less than the existing transport methods. DNR in making its decision as a land manager has its own duty to understand the comparative levels of

risk between the existing and proposed transportation systems. DNR must understand which alternative will be the least environmentally risky method of transporting the increased volume of petroleum products to eastern Washington before it completes any property transaction to authorize OPL's proposed use, and must put environmental concerns above the request for new non-water dependent uses of SOAL. This is especially true as I referred earlier in my testimony to the rigorous environmental standards for granting property rights to non-water dependent uses and the need to find no that practical alternatives to the proposed non-water dependent use exist, as required by WAC 332-30-(122) and (137).

In addition, significant business risks exist. The liability risk resulting from potential damage to the environment and to humans resulting from pipe line failure, leaks, spills explosions, fire, etc. need to be analyzed in coordination with risk management principles. These issues together with the environmental and engineering issues must be analyzed to decide whether the risks are acceptable given the public interest involved, and if so DNR must then determine the level, type and effectiveness of insurance, bonds, or other indemnity or security arrangements that are necessitated by any exposure to these risks. Additional, bonding or security arrangements will also need to be examined to secure any duties imposed for mitigation, monitoring or any other conditions required in a property document. The rent, fees, compensation, damages, etc. that OPL must pay for the placement and use of SOAL must be determined. Although in any case it is clear from RCW 79.90.500 that for nonwater dependent uses the rents, fees, etc., must be determined at fair market value.

Finally, whether there is a duty to consider the risk of potential damages and impacts to the living resources of the non navigable stream tributaries to the state-owned navigable rivers together with any impacts on those wetland habitats associated with those streams under DNR's duty as a public trustee under the Public Trust Doctrine, needs to be considered.

Q: Is OPL's application for a DNR use authorization property document complete as submitted?

A: No.

Q: Would you explain what further information is needed from OPL to complete the use authorization application?

A: OPL, like any applicant, must complete the DNR application form to provide sufficient information and analysis for a proposed use on a site by - site basis for DNR to analyze the worthiness of the application for issuance of a property right.

The required contents of an application are as follows. The application requires a processing fee of \$25.00 for initial application review. The applicant then must provide information about itself, the location and description of the property for which a property right is requested, a description of the use of the property that is proposed, and the improvements to be placed on the property as part of the proposal. These questions on the application must each be answered individually on a site-by-site basis in a narrative form for each crossing. Those answers must complete and be able to stand on their own with out reference to material contained in permit applications or in SEPA compliance

documents. The application further provides that the applicant must supply copies of any required state, local or federal permits or copies of the applications for those permits and a copy of the document that reflects the level of compliance (Determination of Non-significance or Environmental Impact Statement etc.) required by the lead agency under SEPA. The application states that DNR will not grant the property right until its receives all government regulatory permits. Finally, the application provides that the applicant must provide an engineered survey of the site(s) according to the survey instructions on the application form.

Currently OPL's application does not meet the requirements of the application. To date the application information consists of several engineered surveys for each crossing site that do not appear to meet DNR's application guidelines. OPL's answers to the substantive application questions are merely references to specific sections of OPL's EFSEC application in this proceeding. DNR rules provide that the applicant carries the burden of meeting DNR requirements. Consequently, DNR expects that the application materials should be presented explicitly as stated above answering the application questions on a site by site basis in a narrative form that will not require cobbling together excerpts, figures, matrices and exhibits from an application document in another proceeding.

Once the application is complete as stated above, it provides the basis of the initial review under the standards and processes mentioned above. Additional information will be required from OPL if required by DNR to meet those standards. In any case, the initial burden of completing the application in as straight-forward a manner as set out

above and in the application forms and procedures, rests with OPL. OPL's application was assigned an application number by DNR, at my direction in file No. 51-070801 only to be able to set up a file to facilitate the receipt of further application materials by DNR as a convenience to it and OPL. The application could have been rejected, but it wasn't, since DNR anticipated working with OPL to complete the application as only the first step in considering the multitude of issues that OPL's proposal raises.

DNR's land management reviewers and DNR's environmental and technical staff need to work with OPL to identify the further information that will be required to analyze each proposed crossing site under DNR's statutes and rules. However, it is clear the pipeline route and crossings will need to be finalized by OPL as soon as possible. This is because DNR will need to know the exact location of any property right to be granted and because its analysis of environmental impacts must be to known sites and their related ecosystems. If in the application review process additional sites are identified as state owned rivers because avulsed channels are crossed or there are other not yet identified SOAL involved, then additional crossing sites must be applied for by OPL and will then in turn need to be reviewed by DNR under its statutes and rules.

Finally, decisions by regulatory permitting agencies to change the proposed pipeline route may also raise different environmental and business risk issues and may require an amendment to OPL's application for the property rights it needs to obtain from DNR. In any event, all routing decisions, whether driven by the permit process or by OPL's business decisions must be finalized before DNR's property and resource management review and decisions can be completed. Also, Mr. Bower's testimony indicated that there are existing use authorizations in the vicinity of OPL's proposed route. If for

example, crossings of the Columbia River (or elsewhere) will occur in or on existing bridges, trestles or dams controlled by third parties under a DNR granted property right, then DNR, OPL and the holder of the existing property right will need to determine together whether another property right can be issued to OPL without damaging the holder of the existing property right. This issue, if it arises may require a separate property transaction under a separate DNR application, not consolidated with OPL's current application, in order to include adequately the property rights of the third party.

Q: Does that conclude your testimony, Mr. Bortz?

A: Yes, it does.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Signed at _____, Washington on this _____ day of February, 1999.

David G. Bortz

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